Use-of-Force Legal Analysis

While excessive force claims are often best analyzed under the Fourth Amendment's protection against unreasonable seizures, Graham v. Connor, 490 U.S. 386, 394, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), the Supreme Court has recently cautioned that not "all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments[.]" United States v. Lanier, 520 U.S. 259, 272 n.7, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997). Instead, the Court noted that "Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." Id. Thus, while the Fourth Amendment "objective reasonableness" analysis should be used in excessive force cases involving searches and seizures, where there is no search or seizure, the Supreme Court has held that the substantive component of the Fourteenth Amendment's due process clause is the most appropriate lens with which to view an excessive force claim. County of Sacramento v. Lewis, 523 U.S. 833, 843-44, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).

1. **8th Amendment - Prohibits "Cruel and Unusual Punishment"**- "wanton and unnecessarily inflicted pain." The Eighth Amendment applies " ... only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Ingraham v. Wright, 430 U.S. 651, 671, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

> **Amendment VIII, United States Constitution**
> **Excessive Bail, Fines, Punishments**
>
> Excessive bail shall not be required, nor excessive fines imposed, ***nor cruel and unusual punishments inflicted***. [emphasis added]

   a. **8th Amendment Standard:**
      1) The standard: " ... whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

      2) The policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment. Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

      3) Physical abuse directed at a prisoner after he terminates his resistance to authority would constitute an actionable Eighth Amendment violation. Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

      4) Questions to ask:
         a) What was the need for the force?
         b) How much force was used?
         c) What is the extent of the injuries inflicted?
         d) What was the perceived threat by the jail personnel?
         e) Were any efforts made to minimize the use of force?

   b. **Cruel and Unusual Punishment Standard:**

1) **Non-Riot** - the "***cruel and unusual punishment standard***" is higher than the "deliberate indifference" standard. Cruel and unusual punishment will be present only when an "unnecessary and wanton infliction of pain," "obduracy and wantonness," and "actions taken in bad faith and for no legitimate purpose". Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).
   a) All excessive force claims under the 8th Amendment must show malice, sadism, and intent to cause harm. Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

   b) Shackling a quarrelsome inmate to a bed for 72 hours may be actionable. Williams v. Vidor, 17 F.3d 857 (6th Cir. 1994)(*per curiam*).

   c) There is no "significant injury" requirement under the 8th Amendment. Hudson v. McMillian

2) **Riot** - In a prison-riot context (use of force not usually classified as "punishment") the 8th Amendment standard is the equivalent of the substantive due process standard. Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

c. **Not "Cruel and Unusual Punishment:"**
   1) The use of handcuffs with a black box in a standard manner while transporting a prisoner was not malicious and sadistic under Hudson and Whitley. Starbeck v. Linn Co. Jail, 871 F.Supp. 1129 (N.D. Iowa 1994).

d. **Cruel and Unusual Punishment:**
   1) **Stun Gun** - Using a stun gun on a jailee after he had contentiously refused to sweep his cell was cruel and unusual as a matter of law. (Hickey v. Reeder, 12 F.3d 754, 759 (8th Cir. 1993)

   2) **"Mental torture"** could constitute cruel and unusual punishment. (Parsons v. Board of Co. Commr's, 873 F.Supp. 542 (D.Kan. 1994)

2. **Fourteenth Amendment Standard - the "due process clause" prohibits deprivation of " ... life ..." without due process of law**:

> **Amendment XIV, United States Constitution**
>
> **Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life***, liberty, or property, ***without due process of law***; nor deny to any person within its jurisdiction the equal protection of the laws.
> [emphasis added]

a. The 14th Amendment Standard - Whether official conduct "shocks the conscience." Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952).
   1) When decisions are "necessarily made in haste, under pressure, and frequently without the luxury of a second chance ... only a purpose to cause harm ... will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation ..." County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 1711-12, 140 L.Ed.2d 1043 (1998); Medeiros v. O'Connell, 150 F.3d 164 (2nd Cir. 1998); Schaefer v. Goch, 153 F.3d 793 (7th Cir. 1998).

   2) When "deliberation" is possible, then "*deliberate indifference*" may "shock the conscience." Example: the failure to provide adequate medical care to jail detainees.

b. The "due process" standard controls the use of force under certain conditions where the 4th (seizure of a free person) and the 8th (convicted and incarcerated person) Amendments do not apply.
   1) Non-seizure cases:
      a) Unintended person:
         (1) Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000) [very important to compare this case to Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000)]:
            (a) During a shootout, the plaintiff, unbeknownst to the officers, was in the vehicle and was injured by a stray bullet.

            (b) The Court found that the officers "had no opportunity to ponder or debate their reaction to the dangerous actions of the armed man."

         (2) Schaefer v. Goch, 153 F.3d 793 (7th Cir. 1998)

         (3) Medeiros v. O'Connell, 150 F.3d 164 (2nd Cir. 1998)

         (4) Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991) -held that the "unintended consequences of government action [cannot] form the basis for a Fourth Amendment violation.

         (5) Rucker v. Hartford County, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992) - The Rucker Court held that a seizure under th Fourth Amendment occurs only when "one is the intended object of a physical restraint by an agent of the state. Relying on Brower, the Rucker Court granted summary judgment to police officers where an innocent bystander, who was shot and killed by police officers while attempting to stop a felling criminal, was not the "intended object of a physical restraint by the state." The undisputed evidence was that the police officers were firing at the vehicle being driven by the fleeing criminal, and were unaware oft eh innocent bystander's presence.

         (6) Landol-Rivera v. Cruz Cosme, 906 F.2d 791 (1st Cir. 1990) -
            (a) The Landol-Rivera Court held that "a police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of wilful detention of the hostage the Fourth Amendment was designed to govern." Since the hostage was "not the object of the bullet that struck him," the Court held that the hostage's "presence in the car arguably gave the police officers a more compelling need to stop the suspect than if there had been no hostage; the errant bullet did not in these circumstances transform the police action into a seizure."

(b) The officer's seizure was directed appropriately at the suspect, but the officer inadvertently injures an innocent person. The innocent person's injury or death is not a seizure that implicates the 4th Amendment.

(7) Hicks v. Leake, 821 F.Supp. 419 (W.D.Va. 1992) - dismissed action against officer where the driver killed in the collision was not the object of the chase.

(8) See, *When an Innocent Bystander Who is Injured by a Police Officer Can Recover Under § 1983*, by Mark Albert Mesler II, University of Memphis Law Review, Winter 1995, cite as 25 U.Mem.L.Rev. 781.

b) Unintended means:
(1) Lewis v. Sacramento, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

2) Pre-conviction, but post-seizure:
a) Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 417 (1979)

c. County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998):
1) A police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.

2) Holding - in such circumstances, only a purpose to cause harm unrelated to the legitimate object of the arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.

d. Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).
1) Four-part (14th Amendment) "substantive due process" ("shocks the conscience") analysis which considers:
a) The need for the use of force;

b) Relationship between that need and the amount of force that was used;

c) The extent of the injuries inflicted; and

d) Whether the force applied was in good faith or maliciously and sadistically for the purpose of causing harm.

e. Officer shot escaping pre-trial detainee. Court said that it was a due process clause claim and not a Fourth Amendment claim. Court also ruled that the shooting and killing of the pre-trial detainee did not violate due process. Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994), *cert. denied*, 513 U.S. 1044, 115 S.Ct. 639, 130 L.Ed.2d 545 (1994).

f. A pre-trial detainee's beating in the jail was governed by the 14th Amendment. (Valencia v. Wiggins, 981 F.2d 1440 (5th Cir. 1993), *cert. denied*, 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993).

g. "Substantive due process" is based on the "liberty" provided in the 14th Amendment. The idea is that governmental action are so offensive and so unjustified that they violate fundamental rights of freedom. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952) - In Rochin officers pumped the stomach of a narcotics suspect to obtain incriminating evidence - the court said that this behavior by the officers "shocked the conscience."

h. Substantive due process cannot be violated by mere negligence.

3. **Fourth Amendment Standard**

> **Amendment IV, United States Constitution**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against ***unreasonable*** searches and ***seizures***, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [emphasis added]

a. A "seizure" occurs when there is a " ... governmental termination of freedom of movement through means intentionally applied." Brower v. County of Inyo, et al, 489 U.S. 593, 597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989).

b. The Brower Court held that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be wilful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act ... " Brower, 489 U.S., at 596, 109 S.Ct. 1378

c. "[T]he Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful conduct." Brower, 489 U.S., at 596, 109 S.Ct. 1378; Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001).

d. See also, Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).
   1) In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's "objective reasonableness standard," not under substantive due process principles. *490 U.S. at 388, 394.* Because "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation," *id., at 397,* the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. *Id., at 396.* We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Id., at 393, 396.* Graham sets forth a list of factors relevant to the merits of the constitutional excessive force claim, "requiring careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id., at 396.* If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. Saucier, 533 U.S. at 204-05.

e. Official's use of force - "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham v. Conner, 490 U.S. 386, 396, 104 L.Ed.2d 443, 109 S.Ct. 1865 (1989).

f. " ... [T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application ..." Graham, 490 U.S., at 396, *citing* Bell v. Wolfish, 441 U.S. 520, at 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

g. Graham - the 4th Amendment analysis - "***objectively reasonable***" force:
   1) Graham established the constitutional standard for liability for unreasonable use of force (deadly and non-deadly) during a Fourth Amendment seizure.

   2) "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application .. its proper application requires careful attention to facts and circumstances of each case ..." Graham, 490 U.S., at 396.

   3) The Graham analysis applies to all law enforcement excessive force claims - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free person.

   4) The question is whether the officer's actions are "objective reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

   5) The "reasonableness" test:
      a) Reasonableness is determined by balancing the nature and quality of the intrusion with the countervailing governmental interests.

      b) Reasonableness analysis contemplates careful consideration of the facts and circumstances of the incident, including:
         (1) The severity of the crime at issue,

         (2) Whether the suspect poses an immediate threat to the safety of officers and others,

         (3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

      c) Reasonableness is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Graham, 490 U.S., at 396-97.

      d) Not every push or shove violates the 4th amendment.

      e) "Allowance must be made for the fact that officers are often forced to make split-second judgements - in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S., at 396.
         (1) The reasonableness standard must make an allowance for the fact that police officers are often forced to make:
            (a) Split-second judgments

            (b) In circumstances that are:
               i) tense,
               ii) uncertain, and
               iii) rapidly evolving

         (2) Every objectively reasonable law enforcement officer knows:
            (a) There are inherent dangers of the job of law enforcement.

            (b) There are inherent limitations of officers' abilities to assess and respond to perceived threats:
               i) ***Limited Time*** - action beats reaction

ii) ***Limited Abilities*** - during tense circumstances, officers have limited physical and mental capabilities

iii) ***Limited Means*** - officers do not have a reliable means to instantaneously cease a person's threatening actions

iv) ***Limited Control*** - "*chance*" plays a significant role in all human endeavors, and even thought an officer's preparation, training, skill, and planning can lessen the effects of *chance*, these effects cannot be reliably eliminated

f) The officer's underlying intent or motive is irrelevant
(1) Even though the Graham analysis does not care about the officer's motive, if the officer is found to have used "objectively unreasonable" force the door may be opened to punitive damages. The determination as to whether the officer may be liable for punitive damages lies in the officer's motive - evil intent, maliciousness, willful indifference. Racial, ethnic, gender, sexual preference slurs and derogatory statements could indicate discrimination that could lead to the officer being liable under other statutes.

(2) The U.S. S.Ct. noted that an officer's "subjective" intent or motivation could be relevant to the officer's credibility. Graham, 490 U.S., fn. 12, pg. 399.

h. Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995) :
1) Probably the most important aspect of Chew is its detailed analysis, and narrowing, of Graham. Chew restricts the Graham factors on several important issues.
a) Chew states that the MOST important of the Graham factors is "imminent threat" to officers and/or others.
(1) Chew (when compared with Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) pointed out the difference between a "residential neighborhood" and a "scrap yard." In that a "residential neighborhood" has a greater chance of innocent bystanders being injured than a close scrap yard.

(2) Chew pointed out the distinction between a suspect being a threat to the officer and one who picked up a pipe in a scrap yard to protect himself from a law enforcement canine. In other words, knowingly arming himself against an officer vs. picking up a pipe to attempt to stop an attacking dog.

b) Chew distinguishes between "resisting arrest" and "attempting to evade seizure by flight. The Chew Court opined that a suspect is a greater threat while resisting arrest as opposed to merely trying to escape – attempting to evade seizure by flight.

c) Chew emphasizes that when analyzing the "severity of crime at issue" an officer cannot assume the negative. Meaning, according to Chew, that if all the officers know is that the suspect has three (3) outstanding felony warrants, and the officers do not what the warrants are for, and the officers would have had time to check on the warrants, then the officers cannot escalate their force based solely on the knowledge that the suspect has the outstanding warrants. The reason for this is that if a suspect had outstanding warrants for writing (felony level) bad checks, then this knowledge would not allow the officers to escalate their force. However, if a suspect had outstanding felony warrants for violence related crimes – especially violence toward officers – then the officers, armed with "this" knowledge would be able to escalate to a higher level of force.

d) Chew (when compared to Mendoza) points out the importance of "tense, uncertain, and rapidly evolving" incident.

[**This model is a graphical example - and it is NOT legal precedent.**] How can these five (5) factors be graphically demonstrated? By using a 0-10 scale for each of the factors, and another for the officer's use of force, the relationship between the factors and the officer's force can be illustrated.

Force Factors:	None	High
Imminent Threat to Officers/Others	0---1---2---3---4---5---6---7---8---9---10	
Resisting Arrest	0---1---2---3---4---5---6---7---8---9---10	
Circum. Tense, Uncertain, Rapidly Evolv.	0—1—2---3—4---5---6---7---8---9---10	
Severity of the Crime(s) at Issue	0---1---2---3---4---5---6---7---8---9---10	
Attempting to Evade by Flight	0---1---2---3---4---5---6---7---8---9---10	
Officer's Force Used:		
Level of Force Officer Used	0---1---2---3---4---5---6---7---8---9---10	

i. **Under the 4th Amendment's "*objective reasonableness*" standard - an officer does not have to be perfect - or choose the least intrusive method to apply force - officer need only be "objectively reasonable"**
   1) Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)
   2) United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)
   3) Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983)
   4) Tauke v. Stine, 120 F.3d 1363 (8th Cir. 1997)
   5) Warren v. Las Vegas, 111 F.3d 139 (9th Cir. 1997)
   6) Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996)
   7) Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996)
   8) Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995)
   9) Schultz v. Long, 44 F.3d 643 (8th Cir. 1995)
   10) Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994)
   11) Schultz v. Long, 44 F.3d 643 (8th Cir. 1995)
   12) Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994)
   13) Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994)
   14) Bella v. Chamberlain, 24 F.3d 1251 (10 Cir. N.M. 1994)
   15) Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994)
   16) Scott v. Hendrich, 994 F.2d 1338 (9th Cir. 1992)
   17) Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993)
   18) Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993)
   19) Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989)
   20) Dyer v. Sheldon, 829 F.Supp. 1134 (D.Neb. 1993)
   21) Powell v. Fournet, 846 F.Supp. 1443 (D.Colo. 1994)

4. **Officer's Pre-Seizure Conduct - Reasonableness is to be judged at the moment of the use of force - things that occur before, or after, the moment of the use of force are irrelevant:**
   a. **Officer's Pre-Seizure Conduct is Irrelevant:**
      1) Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999) - "Absent additional authority, we cannot agree that the [officer's] pre-confrontation actions should deprive their later conduct in response to Napier's action of its reasonableness."

      2) Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999) - " ... no seizure occurred before the shooting began. That being so, we need not address whether the deputies' [prior] conduct constituted an unreasonable seizure."

3) Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996) - An officer's actions "leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."

4) Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994) - Officers are not required to "keep their distance" in the face of a man armed with knives

5) Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994)

6) Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) - " ... Plakas charged [the police officer] with the poker raised. It is from this point on that we judge the reasonableness of the use of deadly force ... We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct."

7) Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993)

8) Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992) - " ... pre-seizure [law enforcement] conduct is not subject to Fourth Amendment scrutiny."

9) Fraire v. Arlington, 957 F.2d 1268 (5th Cir. 1992)

10) Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991) - The events that occurred before the officer opened the car door and identified herself to the vehicle's passengers are not probative of the reasonableness of the officer's decision to fire the shot - the events are not relevant

11) Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988)

12) Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988)

13) James v. Chester, 852 F.Supp. 1288 (D.So.Carol. 1994)

14) Powell v. Fournet, 846 F.Supp. 1443 (D.Colo. 1994)

b. **Officer's Pre-Seizure Conduct is Relevant:**
1) Abraham v. Rasso, 183 F.3d 279 (3rd Cir. 1999)

2) Allen v. Muskogee, 119 F.3d 837 (10th Cir. 1997)

5. **The Force-Recipient's State of Mind is Irrelevant:**
a. Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999)

b. Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996)

6. **Facts Unknown to the Officer:**
a. Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001). [Officer intentionally shoots - but shoots the wrong person, but did so "reasonably".]
1) The Court held that the deputy's use of deadly force against person who emerged from residence, who he understandably believed under circumstances to be intruder, but who was in fact the victim, was reasonable, and did not violate the victim's 4th Amendment rights.

2) In determining whether the officer's use of force was justified under the 4th Amendment, objective facts must be filtered through the lens of the officer's perceptions at the time of the incident in question; this limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight, and limits the need for decision-makers to sort through conflicting versions

of the "actual" facts, and allows them to focus instead on what the officer reasonably perceived.

b. McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994) - the reasonableness of an officer's conduct where th officer shot a suspect upon receiving a warning from a third person that the suspect had a gun, even though the suspect actually had no weapon.

c. Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991) - the Court held that the officer's force was reasonable where an officer could have had probable cause to believe that a suspect posed a deadly threat even though the suspect turned out to be unarmed.

d. Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991) - The fact that no weapon was later found was not relevant to the officer's reasonable belief that the subject was reaching for a weapon.

7. **Deadly Force - Deadly force may be used to effect a seizure, when necessary:**
   a. To protect officers or others from immediate danger of death or serious physical injury:
      1) Wood v. City of Lakeland (FL), 203 F.3d 1288 (11th Cir. 2000) - a mentally disturbed man with a sharp-edged box cutter.

      2) Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999) - a man acting strange - with a concrete slab

      3) Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999) - a man shot a police dog

      4) Sigman v. Town of Chapel Hill, 161 F.3d 782 (4th Cir. 1998) - a man with a knife

      5) Colston v. Barnhart, 130 F.3d 96 (5th Cir. 1997) - during a minor traffic stop, an unarmed man (the passenger) knocked two (2) officers to the groung and moved in the direction of a police vehicle where a shotgun was located.

      6) Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997) - a man carrying a shotgun while running from police officer was perceived by the court as a "*present threat*" rather than a "fleeing person"

      7) Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996) - a handcuffed, but armed, suspect

      8) Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996) - a juvenile grabbed for officer's gun

      9) Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) - a man with a knife

      10) Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995) - a man with a handgun

      11) Roy v. Lewiston, 42 F.3d 691 (1st Cir. 1994) - intoxicated man with two (2) steak knives

   b. To prevent the escape of a dangerous suspect - fleeing felon deadly force - U.S. Supreme Court Standard - Tennessee v. Garner, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985).
      1) The Garner Court reasoned that the state's interest in law enforcement does not outweigh the unarmed, non-dangerous suspect's interest in life. Consequently, this dictate may require officers to permit some suspects to escape.

      2) **The Garner "Fleeing Felon Rule"** - "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect

who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." Garner, 105 S.Ct., at 1701.

3) Garner requirements - in order for an officer (under Garner) to use deadly force against a fleeing felon:
   a) Deadly Force Defense Standard - The suspect must **threaten the officer with a weapon** OR

   b) Fleeing Felon Standard - all three (3) elements must be present simultaneously:
      (1) the officer must have **probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm**;

      (2) The use of deadly force is **NECESSARY** to prevent the suspect's escape; AND

      (3) The officer must give some **WARNING** of the imminent use of deadly force - if feasible.

4) Garner progeny:
   a) See generally:
      (1) Scott v. Clay County, TN, 205 F.3d 867 (6th Cir. 2000) - During a pursuit, a fleeing motorist posed a danger with the vehicle. The officer's bullet struck the passenger in fleeing motorist's vehicle.

      (2) Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997) - A burglary suspect shot a victim during the burglary. Then the burglary suspect fled - while unarmed. The court found that " ... the suspect need to not be armed or pose an immediate threat to the officers or others at the time of the shooting."

      (3) Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) - An officer shot a fleeing motorist who posed a danger to officers and others with his vehicle during the pursuit.

   b) Failure to give a Garner warning:
      (1) The plaintiff argued that the officer violated the Garner standards by failing to give a warning prior to using deadly force. The Court noted that the officer testified that he gave a warning and that Garner requires a warning only when feasible. The Court ruled that no additional warning was required. Hill v. Jenkins, 620 F.Supp. 272 (N.D.Ill. 1985).

      (2) The officer used the words "halt police" rather than "halt or I'll shoot." In a footnote the Court stated that Garner requires only "some warning" that deadly force would be used. Pruitt v. Montgomery, 771 F.2d 1475 (11th Cir. 1985).

      (3) In a shooting case - a police officer who entered a dark hallway of a private residence at 2:45 a.m., and who failed to give any indication of his identify was more than merely negligent and could be held liable in civil rights actions for use of excessive force against shooting victim. Yates v. City of Cleveland, 941 F.2d 444 (8th Cir. 1991).

   c) The Court held that the city was liable to the suspect for the officer's intentional firing of shotgun at the suspect's legs in an attempt to stop suspect from fleeing from alleged burglary site, pursuant to city's deadly force policy, where officer did not have probable cause to believe the suspect posed physical threat to himself or to others, or that suspect had committed a crime involving the infliction or threatened infliction of serious physical harm. Pruitt v. Montgomery, 771 F.2d 1475 (11th Cir. 1985).

d) Garner standard also applies to self-defense (by officer). Reed v. Hoy, 909 F.2d 324, 329 (9th Cir. 1989).

e) A Fourth Amendment seizure for purposes of Garner is not affected if the officer's shot missed the suspect who was later killed when struck by a moving vehicle. Cameron v. City of Pontiac, 623 F.Supp. 1238 (D.C. Mich. 1985).

f) The killing of a burglary suspect by a trained police dog did not constitute the use of deadly force. The Court found that death by a police dog is an extreme and unusual aberration and that, in fact, the use of police dogs is more likely to result in an officer not having to use deadly force. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988).

c. **Road Blocks can be Deadly Force** - Brower v. County of Inyo, et al, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). Deadly force includes police pursuit tactics such as ambush road blocks.

d. **State Statutes - Deadly Force:**

1) Fitzgerald v. Patrick, 927 F.2d 1037 (8th Cir. 1991). In dismissing a §1983 claim for use of deadly force, the Court held that the officers were entitled to summary judgement where the use of deadly force was objectively reasonable under a state statute authorizing the use of deadly force by peace officers.

2) Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991). The Ansley Court concluded that whether deadly force is reasonably necessary under state law is an issue of fact for the jury to determine. The Court assumed that officers owed no duty to refrain from using deadly force when such force is justified under state statutes.

e. **Departmental Regulations - Policy Violations:**

1) Claybrook v. Birchwell, 199 F.3d 350 (6th Cir. 2000) - In a 14th Amendment accidental shooting context - "even if ... the actions of the [officer's] violated departmental policy or were otherwise negligent, no rational fact finder could conclude ... that those peace enforcement operatives acted with conscience-shocking malice or sadism towards the unintended shooting victim." Claybrook, at 360.

2) Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999)

3) Warren v. Las Vegas, 111 F.3d 139 (9th Cir. 1997)

4) Salim v. Proulx, 93 F.3d 86 (2nd Cir. 1996)

5) Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995)

6) Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994)

7) Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993)

8) Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992)

9) Smith v. Freland, 954 F.2d 343 (6th Cir. 1992)

10) Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991)

11) Murphy v. City of Minneapolis, 292 N.W.2d 751 (Minn. 1990).

a) State laws establish statutory privilege to use deadly force as a defense to common law battery, but not to negligence.

b) Even where force is justified under a statute, however, "negligence" can be proven by showing an officer violated a departmental regulation governing the use of force.

12) Bedley v. State, 189 Ga. App. 374 S.E.2d 841 (Ga. App. 1988). In a criminal battery case, a defendant officer was convicted of simple battery for slapping a prisoner. A departmental manual defining justification for force was admissible into evidence.

f. **Officer Putting Him/Herself in Dangerous Position:**

1) Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991). An officer may be held liable, under common law negligence principles, for putting himself in a situation which requires him/her to use deadly force against an armed, suicidal citizen:

a) Facts - A deputy sheriff stood in an open area of a parking lot while trying to "talk down" a suicidal woman seated in her car with a loaded gun. When the woman raised the gun and took aim at the deputy, he shot and mortally wounded her.

b) Holding - The district court judge (in a bench trial) concluded that the deputy was negligent and that his negligence was the sole cause of the woman's death. In affirming this portion of the district court's decision, the 10th Cir. Court of Appeals reasoned that the deputy, by standing in the open and disregarding his own safety, "forced the deadly confrontation" which resulted.

8. **Officer Shooting at Motor Vehicle:**

a. Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000) - Officer's intentional act of firing at a vehicle that was approaching him in order stop the vehicle and its passengers constituted "seizure" of vehicle's passengers, and injured passenger's resulting § 1983 action against officer was properly analyzed under the 4th Amendment, vehicle was the intended target of the officer's intentionally applied exertion of force.

9. **Uninjured Plaintiffs:**

a. Ingram v. City of Columbus, 185 F.3d 579, 597 (6th Cir.1999). Regardless of whether the suspect's injuries left physical marks or caused extensive physical damage, he can still successfully allege that officers used excessive force against him.

b. Foster v. Metropolitan Airports Commission, 914 F.2d 1078 (8th Cir. 1990):

1) Facts - Plaintiff parked his car in a busy airport loading zone and refused to move his car after being ordered to do so by an officer. As officers attempted to arrest plaintiff, he clung to the door of his car. He was removed, handcuffed, and taken inside the airport.

2) Decision - The Court held that plaintiff's claim that he was pushed twice against a wall does not give rise to a constitutional claim of excessive force where he sustained no injury.

3) Decision - The Court after concluding the officers were justified in using force to overcome plaintiff's resistance went on to affirm the summary judgment dismissing plaintiff's additional claim that the officers "roughed him up" by pushing him against a wall after his arrest.

4) "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Foster, at 1982.

c. Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991). The mere fact that a plaintiff did not sustain a significant injury does not, by itself, defeat an excessive force claim.

d. Johnson v. Morris, 453 N.W.2d 31 (Minn. 1990). The insignificance of an injury, however, may be relevant to a judge's pretrial summary judgment and qualified immunity determinations. Where the facts giving rise to the need for the use of force are not in dispute, the lack of any injury demonstrating that the force used was disproportionate to the need enhances the possibility a judge will find no excessive force as a matter of law.

e. Ortega v. Schramm, 922 F.2d 684 (11th Cir. 1991). A deputy sheriff received a tip from an "informant" who claimed to have seen a human arm protruding from the trunk of an automobile in plaintiff's filing station. After hours of surveillance, the deputy decided to conduct a search of the premises. The Court held that the deputy violated the Fourth Amendment's proscription against unreasonable force where he: (1) did not first identify himself as a police officer before entering the premises; (2) entered the station by shooting the lock off the door with a shotgun; (3) held plaintiff at gunpoint while searching the premises; and (4) marched the plaintiff at gunpoint from the gas station.

f. Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991). The jury could properly find that an officer's use of pain compliance techniques before a suspect posed any immediate threat to the arresting officers was excessive force.

10. **Minimal Application of Force:**
    a. Bauer v. Norris, 713 F.2d 408 (8th Cir. 1983). "[T]he use of any force by officers simply because a suspect is argumentative, contentions or vituperative is not to be condoned." Bauer at 412, quoting Agee v. Hickman, 490 F.2d 210, 212 (8th Cir.) *cert. denied*, 417 U.S. 972 (1974).

    b. United States v. Harrison, 671 F.2d 1159 (8th Cir. 1982). Seemingly minimal applications of force may be viewed as excessive in the absence of any need for force.

11. **Arrestee's Right of Self Defense:**
    a. An arrestee has the right to use reasonable force only in self-defense against an officer who is using excessive force during a lawful arrest. State v. Wright, 310 Or. 430, 799 P.2d 642 (1990), *aff'g,* 100 Or. App. 22, 784 P.2d 445 (1989).

    b. Striking a police officer who was using excessive force while attempting to arrest another was only justified to save the other from death or serious bodily injury. The state had abolished the right to resist an unlawful arrest, but retained a limited right of self-defense against excessive force amounting to a threat of serious injury. Commonwealth v. French, 396 Pa. Super. 436, 578 A.2d 1292 (1990).

12. **Specific Weapons:**
    a. **Batons:**
        1) An inebriated arrestee resisted and the officer hit him on the knee in self-defense with a "power chop" from a heavy baton. An instruction at the onset of trial that the arrest was lawful was not prejudicial and the court's refusal to admit a videotape of defendant's training in the use of the weapon was at most harmless error where there was other evidence that it was unauthorized. Fronk v. Meager, 417 N.W.2d 807 (N.D. 1987).

    b. **Bean Bags:**
        1) Bell v. Irwin, 2003 U.S. App. LEXIS 3415 (7th Cir. February 25, 2003).

    c. **Blackjacks:**
        1) An officer's blackjacking of an inebriated, handcuffed arrestee in the good-faith belief that such was necessary to effect the arrest was properly regarded as negligent under the Torts Claims Act. Jackson v. North Carolina Dept of Crime Control, 97 N.C.App. 425, 388 S.E.2d 770, *cert. denied*, 326 N.C. 596, 393 S.E.2d 878 (N.C. 1990).

2) An unwarranted blackjacking of an inmate occurred in the course of duty and respondeat superior was present. Thomas v. Ohio Department of Rehabilitation, 40 Ohio App. 3rd 86, 548 N.E.2d 991 (Ohio App. 1988).

d. **Brandishing of Firearms:**

1) A state tort claim that an officer displayed a weapon during an arrest was not actionable since a display of force is legal in Texas where no immediate threat of use of the weapon occurred. Hinojosa v. City of Terrell, Texas, 834 F.2d 1223 (5th Cir. 1988), *superseded by*, 864 F.2d 401 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 80 (1989).

2) A plaintiff who was mistakenly arrested for selling stolen goods made an assault claim based on the fact that drawn guns were brandished during the arrest. The plaintiff's claim failed since "the threatened use of force" was not "clearly excessive" unless accompanied by "verbal threats" or other mistreatment. Jackson v. District of Columbia, 412 A.2d 948 (D.C. 1980).

e. **Chemical Agents:**

1) In a police chief's use of mace on a subject, it was found that the police chief was personally entitled to qualified immunity, but as the chief of police of the city, the chief enjoyed sufficient policy making authority to create municipal liability. There were questions under the fourth amendment as to the chief's reasonableness of the use of the mace without warning and the reasonableness of the length and manner of the use of the mace. Lester v. City of Rosedale, Mississippi, 757 F.Supp. 741 (N.D.Miss. 1991).

2) A plaintiff who was resisting arrest, had to be removed from his position on a car trunk and was maced to facilitate handcuffing. The plaintiff was maced again when he resisted entry into a police car. The Court said "If anything, it was fortunate for plaintiff [that] the officers used mace, rather than more severe physical methods." Jackson v. City of Baton Rouge, 286 So.2d 743 (La.Ct.App. 1973).

f. **Handcuffs:**

1) Kostrzewa v. City of Troy, 247 F.3d 633(6th Cir. 2001) - Even though the cuffs were on the loosest possible setting, overly tight application of handcuffs on a nonviolent detainee might be an excessive use of force, in the absence of any indication that detainee would resist or attempt to flee.

2) Martin v. Heideman, 106 F.3d 1308, 1312-13 (6th Cir.1997) - excessive force claims can be maintained for cuffing an individual's wrists too tightly.

3) Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir.1993) - excessive force claims can be maintained for cuffing an individual's wrists too tightly.

4) The use of handcuffs is discretionary, but unreasonable and therefore the use of the handcuffs precludes immunity. The key issues are that Ospina was not a threat under the Graham analysis. The use of the handcuffs was discretionary. The officer caused "excruciating pain" and "continuing serious medical problems" by the application of the handcuffs. Ospina v. Department of Corrections, State of Delaware, 769 F.Supp. 154 (D.Del. 1991).

5) A plaintiff's claim against an officer of reckless and negligent handcuffing was subject to the intentional torts statute of limitations since the act involved "intentional contact" and was an intentional battery - offensive touching. Love v. City of Port Clinton, 37 Ohio St.3d 98, 524 N.E.2d 166 (1988).

6) Plaintiff states that the handcuffs were put on in an abusive manner and that she was physically injured in the arrest. A witness stated that when the policemen handcuffed Mrs. Hansen he was rough and abusive to her person and I (the witness) was upset at the treatment she was receiving. The plaintiff had bruises on her wrist and under her upper arm and she complained of pain in her little finger and upper arm. The Court stated "[v]iewing the facts in the light most favorable to Hansen [the Plaintiff], the officers used excess force on Hansen by unreasonably injuring her wrist and arm as they handcuffed her. If Hansen is believed, the police officers' actions were objectively unreasonable in light of facts and circumstances confronting them. Based on the record, the district court improperly granted summary judgment for the officers." Hansen v. Black, 885 F.2d 642 (9th Cir. 1989).

g. **Knives/Edged Weapons:**

1) The decedent advanced toward the officers with a machete that had a 24-inch blade, the decedent raised the machete after ignoring warnings to drop it, and the decedent got within four to six feet of the officers before the decedent was shot. The court found as a matter of law that the use of deadly force was reasonable. Rhodes v. McDaniel, 945 F.2d 117 (6th Cir. 1991).